U.S. Department of Justice

Immigration and Naturalization Service

D2

[redacted]

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

File: EAC-99-012-54187 Office: Vermont Service Center Date: 07 JAN 2002

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(H)(i)(b)

IN BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was approved by the Director, Vermont Service Center. Based upon information obtained from the beneficiary during the visa issuance process at the American Embassy, the director concluded that the beneficiary was not clearly eligible for the benefit sought. Accordingly, the director served the petitioner with notice of his intent to revoke approval of the visa petition and his reasons therefore, and ultimately revoked the approval of the petition. The matter is now before the Associate Commissioner for Examinations on appeal. The director's decision will be withdrawn and the matter remanded to him for further action and consideration.

The petitioner is a provider of physical rehabilitation services which employs twenty physical therapists and has a gross annual income of $300,000. It seeks to employ the beneficiary as a physical therapist for a period of three years. The director noted that company financial records submitted to the U.S. Consulate in Manila, Philippines show that the company submitted Forms 1099 rather than W-2s for its physical therapists and concluded that the petitioner intends to hire the beneficiary as a contractor and not as an employee.

On March 28, 2000, the director advised the petitioner in writing of his determination that the relationship between the petitioner and the beneficiary is not a qualifying employer-employee relationship and of his intent to revoke the approval of the petition.

The record shows that the petitioner responded to the notice with a letter dated April 3, 2000 and additional documentation. The record further shows that the petitioner's response to the notice was received by the Service on April 28, 2000.

On December 19, 2000, the director revoked the approval of the petition because the petitioner had failed to respond to the notice of intent to revoke.

On appeal to the revocation, counsel stated that the director failed to consider the documents submitted in response to the notice of intent to revoke. Counsel submitted photocopies of the documents previously submitted along with a photocopy of a certified postal return receipt showing the documents were received at the Vermont Service Center on April 28, 2000.

Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(H)(i)(b), provides in part for nonimmigrant classification to qualified aliens who are coming temporarily to the United States to perform services in a specialty occupation. Section 214(i)(1) of the Act, 8 U.S.C. 1184(i)(1), defines a "specialty occupation" as an occupation that requires

theoretical and practical application of a body of highly specialized knowledge, and attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

8 C.F.R. 274a.1(f) states in pertinent part:

> The term *employee* means an individual who provides services or labor for an employer for wages or other remuneration but does not mean independent contractors...

8 C.F.R. 274a.1(g), states in pertinent part:

> The term *employer* means a person or entity, including an agent or anyone acting directly or indirectly in the interest thereof, who engages the services or labor of an employee to be performed in the United States for wages or other remuneration. In the case of an independent contractor..., the term employer shall mean the independent contractor or contractor and not the person or entity using the contract labor.

The director has questioned whether a bona fide employer-employee relationship exists between the petitioner and the beneficiary. In this case, the Forms 1099 contained in the record show that the physical therapists employed by Rehabcare & Wellness are paid by the petitioner and not by the companies with which the petitioner contracts to provide physical therapy services. The petitioner clearly intends to engage the services of the beneficiary in the United States for wages or other remuneration. In view of the foregoing, it is concluded that an employer-employee relationship exists between the petitioner and the beneficiary, its intended employee. Therefore, the director's objections to the approval of the petition have been overcome on this one issue.

The director has not determined whether the proffered position is a specialty occupation. Furthermore, the director must reexamine the evidence contained in the record relating to the beneficiary's academic credentials to determine whether the beneficiary qualifies to perform services in a specialty occupation. Additionally, the director must take into consideration the petitioner's timely response to the director's notice of intent to revoke the approval of the visa petition. Accordingly, the matter will be remanded to the director to make such determinations and to review all relevant issues. The director may request any additional evidence he deems necessary. The petitioner may also provide additional documentation within a reasonable period to be determined by the director. Upon receipt of all evidence and representations, the director will enter a new decision.

ORDER: The decision of the director is withdrawn. The matter is remanded to him for further action and consideration consistent with the above discussion and entry of a new decision which, if adverse to the petitioner, is to be certified to the Associate Commissioner for review.